Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-458

ROBERT DAVID WARD,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

MALCOLM W. HOUSTON
3720 Farragut Avenue
Kensington, Maryland 20795
(301) 946-3099
Attorney for Appellant.

Washington, D.C. • THIEL PRESS • (202) 638-4521

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioner, Robert D. Ward, respectfully urges this Court to issue a writ of certiorari to review the judgment in the above captioned case.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals of Maryland, is reported as *Ward v. State* and cited as 374 A.2d 1118 and is fully set out in the Appendix at 1a.

JURISDICTION

The opinion and order of the Court of Appeals of Maryland, the highest court of that state was decided June 24, 1977 and its mandate entered on the 25th day of July, 1977. Jurisdiction is founded upon Article II, Section 2, Constitution of the United States.

QUESTION PRESENTED FOR REVIEW

Whether the Federal Aviation Act of 1958 has pre-empted to the Federal government control over the operation of aircraft and pilots so as to preclude state legislation in the same area, thus rendering the Maryland Aviation Act (as well as similar Acts of other states) unconstitutional, or alternatively put, whether it is the expressed intention of the Federal Aviation Act of 1958 that the Federal government not share its regulatory power with the states.

Whether the Maryland Aviation Act conflicts with the Federal Aviation Act.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES OF AMERICA

Article 1, Section 8 Clause 3

The Congress shall have the power . . .

To regulate Commerce with foreign Nations, and among the several states and with the Indian Tribes;

Article 6 Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any

Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Federal Aviation Act of 1958, Title 49, U.S. Code Annotated Section 1301 *et seq:*

The Maryland Aviation Act, Article 1A Section 10 -1002 and 3; as set forth in this Appendix.

STATEMENT OF THE CASE

On May 19, 1975 Robert David Ward was the holder of a valid student pilot license and medical certificate issued by the Federal Aviation Administration (FAA) pursuant to the applicable Federal Aviation Regulations (FAR's).

On that day, the Petitioner engaged in low flight while piloting an aircraft over Greenbelt, Maryland, and within eight (8) hours of consuming alcoholic beverages.

He was charged by the State with reckless operation of an aircraft by reason of the low flying and flying while under the influence of alcohol, Article 1A Section 10-1002, Annotated Code of Maryland. The latter charge was subsequently deleted.

At both the District and Circuit Court levels the Defendant moved to dismiss the charge solely on the basis of the unconstitutionality of the charging statute, in view of the preemptive nature of the Federal Aviation Act of 1958.

The motion was denied in both instances, and the Defendant was convicted in District Court on September 19, 1975 and in the Circuit Court for Prince George's County, Maryland, on July 20, 1976.

Upon conviction he was fined $500 and sentenced to 90 days. The execution of the prison sentence was suspended upon the condition that he not fly an airplane in

the State of Maryland for one year from the date of conviction.

Simultaneously eight charges of violations of the Federal Air Regulations were brought against Ward by the Federal Aviation Administration resulting in the revocation of his flying license.

After an intensive investigation of Ward's level of aeronautical knowledge and the facts of the flight itself the Federal Aviation Administration granted permission to reissue his license six (6) months after surrender to it. By the terms of this Order Ward was authorized to fly again in June of 1976.

Upon Ward's conviction in the highest nisi prius court of Maryland in July of 1976 he petitioned for Certiorari in the Cour of Appeals of Maryland, the highest appellate Court of that State, which writ was granted. The sole questions raised were whether the State Aviation Act was void because of conflict and the preemptive nature of the Federal Act. In its opinion filed June 24, 1977 that Court held that the Federal Aviation Act of 1958 was not preemptive so as to preclude state action in the control of pilots and aircraft and that there was no conflict between the Maryland Act and the Federal Act.

The dissenting opinion held that there was a conflict.

REASON FOR GRANTING THE WRIT

As set forth in the opinion of the Court of Appeals of Maryland, "The issue for decision is narrow in lineation but sweeping in implication" (p. 2)

While the narrow issue is the validity of the Maryland Aviation Act in the face of the Federal Aviation Act the sweeping issue is the validity of the Aviation Acts of some thirty-five other states.

A decision in this case will determine, once and for all, whether control over the operation of aircraft will rest solely with the Federal Government or will be shared by the States.

The historical concept is that since aircraft do not recognize geographic boundries these must be a single, unified plan for this control which balances safety and efficiency both on the ground and in the air. This single plan was authorized by the Federal Aviation Act of 1958, and its predecessors, and promulgated by the Federal Aviation Regulations.

If the present decision is left standing it will be open season for every state to share in the control of aircraft, destroying completely the uniformity of control which now exists and which is imperative due to the nature of flight.

Numerous cases have held or indicated that the Federal Aviation Act is preemptive. Unfortunately, for clarity of decision, the State acts were usually in conflict with the Federal Aviation Act and were struck down on both grounds.

The Federal Aviation Act, title 49, U.S. Code Annotated, at Sec. 1508(A) says:

> (A) "The United States of America is declared to possess and exercise complete sovereignty in the airspace of the United States. . . ."

The Civil Aeronautics Act of 1938 was held to be preemptive in *Alleghney Airlines v. Village of Cedarhurst,* 132 F.Supp. 871, 1955 U.S. District Court, N.Y. 239 F.2d 812, 2nd Circuit.

There the Court said:

> *"The Plaintiff's contention that the legislative action by Congress together with the regulations,* adopted

pursuant thereto, *have regulated air traffic* in the navigable airspace in the interest of safety *to such* an *extent as* to *constitute preemption in that field is upheld.* The States, including the Village of Cedarhurst, are thus precluded from enacting valid contrary or conflicting legislation." (Emp. Supplied)

A similar result was read in *City of Newark v. Eastern Airlines,* 159 F.Supp. 750, 1958 U.S.D.C., New Jersey where the court held, referring to the Civil Aeronautics Act of 1938:

"This legislation clearly evidenced the intent of Congress to preempt the exclusive power of regulation and control in the field of interstate air commerce." page 755 and the court noted:

"It seems obvious that in the field uniformity of regulations is essential if the maximum standards of safety are to be maintained" page 757

The principle was again enunciated in *American Airlines v. Town of Hempstead,* 1967, 272 F.Supp. 226, E.D.N.Y. USDC, *affirmed* 298 F.2d 369 (2nd Cir.) 1968, Cert. Den. 393 U.S. 1017, 1969.

The most recent articulations of the preemption of the 1958 act and its scope are:

Lockheed Air Terminal v. City of Burbank, 318 F.Supp. 914 U.S. District Court (1970) C.D. Calif.

Lockheed Air Terminal v. City of Burbank, 457 F.2d 668 (1972) U.S. Ct. of Appeals, Ninth Cir.

Lockheed Air Terminal v. City of Burbank, 411 U.S. 624 (1973) U.S. Supreme Ct.

The opinion of the United States Court of Appeals seemed to set forth the rule clearly: (page 671)

"The pervasiveness of federal regulations in the filed of air commerce, the intensity of the national in-

terest in this regulation, and the nature of air commerce itself require the conclusion that state and local legislation in that area has been preempted.

In this case we have found the conclusion of federal preemption unavoidable.

Therefore, the states may not exercise concomitant or supplementary powers over the identical activity." (Emp. Supplied.)

In the *Burbank* case at page 549, the first page of the Court's opinion, the Supreme Court disposes of the matter on preemption grounds alone:

"The District Court found the ordinance to be unconstitutional on *both* Supremacy Clause and Commerce Clause grounds. 318 F.Supp. 914. The Court of Appeals affirmed on the grounds of the Supremacy Clause both as respects preemption and as respects conflict."

". . . *In view of our disp osition of this appeal under the doctrine of preemption, we need not reach this question.*" (Emp. Supplied.)

It is now said that the *Burbank* case related only to the Noise Control Act or that, at any rate, the states may exercise complimentary control.

What is said to be "complimentary" however, does not always turn out to be as in the Ward case where a pilot who was reissued his federal authority to pilot an aircraft any where within the United States was specifically prohibited from flying within the State of Maryland.

CONCLUSION

The Federal Aviation Act of 1958 is preemptive so as to preclude state or municipal legislation effecting control over the operation of aircraft, even though the statute expresses itself as merely complimentary to the Federal Statute.

The Maryland Statute, with its sentencing provisions is clearly in conflict with the Federal Statute and the FAR's issued thereunder.

Respectfully submitted,

MALCOLM W. HOUSTON
3720 Farragut Avenue
Kensington, Maryland 20795

Attorney for Appellant.

APPENDIX

APPENDIX

[1118]

Robert David WARD

v.

STATE of Maryland.

No. 87.

Court of Appeals of Maryland.

June 24, 1977.

* * *

Malcolm W. Houston, Kensington, for appellant.

Alexander L. Cummings, Asst. Atty. Gen., Baltimore (Francis B. Burch, Atty. Gen. and Clarence W. Sharp, Asst. Atty. Gen., Baltimore, on the brief), for appellee.

Argued before SINGLEY, SMITH, DIGGES, LEVINE, ELDRIDGE, ORTH and ROBERT F. SWEENEY (Specially Assigned), JJ.

ORTH, Judge.

For over a quarter of a century it has been a crime under the laws of Maryland "to operate an aircraft in the air, or on the ground or water, while under the influence of intoxicating liquor, narcotics, or other habit-forming drug, or, . . . in a care-

less or reckless manner so as to endanger the life or property of another." Acts 1949, ch. 422, § 29; Acts 1974, ch. 363, § 2; Maryland Code (1951) and (1957) Art. 1A, § 29; Maryland Code (1957, 1968 Repl.Vol., 1974 Cum.Supp.) Art. 1A, § 10–1002.[1] *See*

[1119] Maryland Code (1957, 1971 Repl.Vol., 1974 Cum.Supp.) Art. 38, § 1. The statute has never been before the appellate courts of this State. Robert David Ward presents it to us in this appeal. In challenging the judgment entered against him upon being found guilty of operating an aircraft in a reckless manner,[2] he does not dispute the accuracy of the facts and circumstances resulting in his arrest and prosecution by the State. Nor does he present any question as

1. Acts 1974, ch. 363 repealed former article 1A, "Aeronautics", and enacted present article 1A, "Aviation," to take effect 1 July 1974. The identical language of former § 29 appears in the present § 10–1002.

2. As initially executed, the Statement of Charges under which Ward was prosecuted by Maryland, in addition to the charge that he operated an aircraft "in a reckless and unsafe manner," alleged that he operated an aircraft "while under the influence of intoxicating liquor." For reasons not disclosed in the record before us, the charging document was amended by deleting the latter charge.

to the sufficiency of the evidence to prove beyond a reasonable doubt the corpus delicti of the offense and his criminal agency. And he offers no claim that the penalties imposed were in any way at variance with the sanctions authorized. The issue he raises is that Maryland was precluded from prosecuting him because the statute proscribing the conduct was preempted by federal law. He therefore, claims error in the denial by the trial court of his motion to dismiss the charges.

The issue for decision is narrow in lineation but sweeping in implication. The great majority of the states have enacted legislation similar to the Maryland statute, some in identical language, making it a crime to operate an aircraft so as to endanger the person or property of another.[3] If

3. Most of the state statutes speak in terms of operating an aircraft recklessly or while under the influence of intoxicating liquor or habit-forming drugs. *See*, for example:

Alabama-Ala. Code, tit. 4, § 20 (30) 5 (1958);
Alaska-Alas. Stat. § 02.30.030 (1962);
Arizona-Ariz. Rev. Stat. § 28–1744 (1976);
Arkansas-Ark. Stat. Ann. § 74–109 (1957);
California-Cal. Pub. Utilities Code § 21407 (West 1965);
Connecticut-Conn. Genl. Stat. § 15–72 (1977);
Delaware-Del. Code Ann. tit. 2, § 304 (1974);

[footnote continued]

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Ward's view that the state statutes are preempted prevails there could be no criminal prosecution, under existing laws, by any state, or, as we shall see, by the federal

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Florida-Fla. Stat. Ann. § 860.13(1)(b) (1976);
Georgia-Ga. Code Ann. § 11–101 (1973);
Hawaii-Hawaii Rev. Stat. § 263–11 (1968);
Idaho-Idaho Code § 21–112 (1947);
Indiana-Ind. Stat. Ann. § 8–21–4–8 [14–109] (Burns 1973);
Iowa-Iowa Code Ann. § 328.41 (Supp. 1976);
Maine-Me. Rev. Stat. Ann. tit. 6 § 202(9) (1964);
Michigan-Mich. Comp. Laws Ann. § 259.180 (1967);
Minnesota-Minn. Stat. Ann. § 360.075 (1966);
Mississippi-Miss. Code, § 61–11–1 (1972);
Missouri-Mo. Rev. Stat. § 305.030 (1969);
Montana-Mont. Rev. Code § 1–603 (1968);
Nevada-Nev. Rev. Stat. § 493.130 (1973);
New York-N.Y. Genl. Bus. Law § 245 (L.C.P. Cum. Supp. 1976);
North Carolina-N.C. Genl. Stat. § 63–18 (1975 Repl. Vol.);
Ohio-Ohio Rev. Code § 4561.15 (Anderson 1967);
Oregon-Ore. Rev. Stat. § 493.160 (1973);
South Carolina-S.C. Code, ch. 1, § 2–10 (1962);
South Dakota-S.D. Comp. Laws Ann. § 50–13–16 (1967);
Tennessee-Tenn. Code Anno. § 42–113 (1964 Repl. Vol.);
Virginia-Va. Code § 5.1–13 (1973 Repl. Vol.);
Wisconsin-Wisc. Stat. Ann. § 114.09 (1974).

[footnote continued]

government, for operating an aircraft in a careless or reckless manner or while under the influence of intoxicating liquor, narcotics, or other habit-forming drug, no matter how flagrant the conduct proscribed and regardless of the seriousness of the danger to life and property occasioned by that conduct. We have not been referred to a decision of another jurisdiction, state or federal, which addresses the matter of preemption of a statute prohibiting such operation of an aircraft. There being no decision pre-
[1120] cisely on point to bind or persuade us, we shall follow the path laid out by the decisions of the Supreme Court of the United States concerning the doctrine of preemption to determine whether the Maryland statute is enforceable.

There are other state statutes which speak only in terms of operating an aircraft while under the influence of intoxicating liquor or habit-forming drugs. *See*, for example:

Illinois-Ill. Ann. Stat., ch. 15½, § 22.43d (Smith-Hurd, Cum. Supp. 1977);
Massachusetts-Mass. Ann. Laws, ch. 90, § 44 (1975);
New Jersey-N.J. Stat. Ann. § 6:1–18 (1973);
Pennsylvania-Pa. Stat. Ann. tit. 2, § 1475(a) (Purdon 1963);
Texas-Tex. Rev. Civ. Stat., art. 46f–3 (1977);
Wyoming-Wy. Stat. § 10–13 (1959).

I

To put the issue for decision in perspective we recount what Ward did and what happened as a result.[4] Ward was the holder of a valid student aircraft pilot license and medical certificate issued by the Federal Aviation Administration (FAA), pursuant to the applicable Federal Aviation Regulations (FAR). On the late afternoon of 18 May 1975 he made an instructional flight from Hyde's Airfield in Clinton, Prince George's County, Maryland. Thereafter, he and his instructor pilot enjoyed a quiet dinner complete with pre- and post prandial liquid refreshment in an amount sufficient, when Ward was examined some hours later, to show a blood alcohol level of 0.17 percent.[5] Later that evening, after a visit with Ward's parents, Ward and his instructor returned to the airport. Ward slept in

4. At the trial in the circuit court the case was submitted on "stipulation of facts." That stipulation is not in the record before us, but the facts are presented to us on an agreed statement pursuant to Maryland Rule 828 g.

5. By way of comparison, a prosecution for a violation of the Maryland Vehicle Laws with respect to driving a vehicle, 0.17 percent by weight of alcohol in the blood of a person is in excess of the percent giving rise to *prima facie* evidence of intoxication. Maryland Code (1974, 1975 Cum.Supp.) Courts and Judicial Proceedings Article § 10–307(e).

his car for some hours. On awakening in the early morning he decided to practice some "touch and gos"—taking off and landing without leaving the airport pattern. Inadvertently entering clouds, he climbed above the cloud layer and circled what he assumed to be the Chesapeake Bay area, until breaks were visible in the overcast. It was about 6:00 A. M. when he descended through a hole in the clouds. He established that his position was over Greenbelt, Maryland, and in an apparent burst of euphoria he "buzzed" nearby apartments. His activities were observed by a Maryland State Police officer in a helicopter who followed the plane back to the airport. Ward was arrested upon landing.

Ward was tried in the District Court of Maryland in Prince George's County on a charge of operating an aircraft in a reckless manner, convicted, and appealed from the judgment entered to the Circuit Court for Prince George's County. Tried *de novo* by the judge in the circuit court, he was again found guilty. He was fined $500 and costs and sentenced to imprisonment for a term of 90 days. The prison sentence was suspended "upon special condition that he not operate an aircraft within the State for a period of one year from September 17,

1975."[6] Upon Ward's petition we issued a writ of certiorari to review the judgment of the Circuit Court for Prince George's County.

In a civil proceeding, the Federal Aviation Administration determined that Ward had violated seven Federal Aviation Regulations in his operation of the aircraft on 19 May 1975, including FAR 91.9, prohibiting the careless or reckless operation of an aircraft so as to endanger the life or property of another. It ordered that his airman certificate be revoked. Subsequently, however, "after a thorough investigation of Mr. Ward, his instructor, his level of aeronautical knowledge and the flight leading to his prosecution, FAA granted permission to reissue his license six (6) months after surrender to it."

II

The opinion of the Court in *Knapp v. Schweitzer*, 357 U.S. 371, 78 S.Ct. 1302, 2 L.Ed.2d 1393 (1958) (Frankfurter, J.), reminded, at 375, 78 S.Ct. at 1305, that the Constitution of the United States "is one of

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6. The same fine and term of imprisonment had been imposed by the District Court. That court also suspended the execution of the prison sentence, but spelled out that Ward was placed on unsupervised probation for two years upon the condition that he "not fly an aircraft in State of Md. within one year."

particular powers given to the National Government with the powers not so delegated reserved to the States or, in the case of limitations upon both governments, to the people. Except insofar as penal remedies may be provided by Congress under the
[1121] explicit authority to 'make all Laws which shall be necessary and proper for carrying into Execution' the other powers granted by Art. I, § 8, the bulk of authority to legislate on what may be compendiously described as criminal justice, which in other nations belongs to the central government, is under our system the responsibility of the individual States."[7] It is apparent that the Constitution alone does not deny Maryland

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7. The Court observed that the adoption of the Fourteenth Amendment did not change the distribution of powers between the States and the Federal Government so as to withdraw the basic interests of criminal justice from the exclusive control of the States, but it did impose restrictions upon the States in the making and in the enforcement of the criminal laws. "It did this insofar as the 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . are implied in the comprehensive concept of due process of law. But this concept does not blur the great division of power between the Federal Government and the individual States in the enforcement of the criminal law." *Knapp v. Schweitzer*, 357 U.S. 371, 378, 78 S.Ct. 1302, 1307, 2 L.Ed.2d 1393 (1958).

the power to enact the challenged statute. "While federal pre-emption of state statutes is, of course, ultimately a question under the Supremacy Clause, U.S. Const., Art. VI, cl. 2,[8] analysis of pre-emption issues depends primarily on statutory and not constitutional interpretation." *City of Philadelphia v. New Jersey*, —— U.S. ——, ——, 97 S.Ct. 987, 988, 51 L.Ed.2d 224 (1977). Thus, we are required to decide only whether federal laws in the field of aviation preclude Maryland from enforcing its statute.

The Supreme Court of the United States traced the path, "clearly laid out" by its prior decisions, which must be followed to answer this question. *Jones v. Rath Packing Co.*, —— U.S. ——, ——, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). We summarize

8. The second clause of Art. VI of the Constitution of the United States reads:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

what was said. The first inquiry is whether Congress, pursuant to its power to regulate commerce, has prohibited state regulation in the area. That is, has Congress occupied the field to the exclusion of state action. "Where, as here, the field which Congress is said to have preempted has been traditionally occupied by the States, . . . '[w]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress'." *Id.* It is when Congress has "unmistakably . . . ordained," either explicitly by command in the statute's language, or implicitly by the statute's structure and purpose, that its enactments alone are to regulate a part of commerce, that state laws regulating that aspect of commerce must fall.

If Congress has not so occupied the field as to exclude all state action, inquiry turns to whether the federal and state laws conflict. "Congressional enactments that do not exclude all state legislation in the same field nevertheless overrule state laws with which they conflict." *Id.* State and federal laws are so inconsistent that state law must give way when, under the circumstances of the particular case, the state's

law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." In this determination, there is considered "the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Id.*

[1] It seems, in the final analysis, that a federal statute preempts a state statute when such was the Congressional intent. Even when Congress exercises its paramount authority it may determine how far its regulation shall go. "There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does, state regulation outside that limited field and otherwise
[1122] admissible is not forbidden or displaced." *Kelly v. State of Washington*, 302 U.S. 1, 10, 58 S.Ct. 87, 92, 82 L.Ed. 3 (1937). The Court said in *DeCanas v. Bica*, 424 U.S. 351, 360, n. 8, 96 S.Ct. 933, 938, 47 L.Ed.2d 43 (1976), quoting *Hines v. Davidowitz*, 312 U.S. 52, 78–79, 61 S.Ct. 399, 85 L.Ed. 581 (1941) (Stone, J. dissenting):

> Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has

> precluded a state from the exercise of any power reserved to it by the Constitution. To discover the boundaries we look to the federal statute itself, read in the light of its constitutional setting and its legislative history.

The intent to supersede the exercise by a state of its police power as to matters not covered by federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. Such intent is not to be implied unless the act of Congress is in actual conflict with the law of the state, and, as the Supreme Court has said, *Jones v. Rath Packing Co., supra*, 97 S.Ct. at 1309, an "actual conflict" occurs only when the state's law "'stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress'." *See Governor of Maryland v. Exxon Corp.*, 279 Md. 410, 370 A.2d 1102, 1125. Furthermore, "[t]he application of the principle is strongly fortified where the state exercises its power to protect the lives and health of its people." *Kelly v. State of Washington, supra*, 302 U.S. at 13, 58 S.Ct. at 93.

III

The federal law which Ward urges preempts the Maryland statute is the Federal Aviation Act of 1958, 72 Stat. 749, 49 U.S.C.A. (1970) § 1301 *et seq.* which had its roots in the Air Commerce Act of 1926, 44 Stat. 568, and the Civil Aeronautics Act of 1938, 52 Stat. 973. It has been said that the main stimulus for the enactment of the 1958 Act was the undesirable state into which the quality of safety regulation of aeronautics had fallen. *See* 1958 U.S.Code Cong. & Admin. News, pp. 3741, 3742; *Comment*, 39 J.Air § Com. 521, 526–527 (1973). The 1958 Act created the Federal Aviation Program, 49 U.S.C.A. (1970) ch. 20. It is apparent that the Federal Aviation Program established a comprehensive scheme for the safe and efficient use of the nation's airspace. 1958 U.S.Code Cong. & Admin. News, p. 3741. *See Arney v. United States*, 479 F.2d 653, 658 (9th Cir. 1973); *United States v. Christensen*, 419 F.2d 1401, 1404 (9th Cir. 1969); *Pike v. C.A.B.*, 303 F.2d 353, 355 (8th Cir. 1962); *Air Line Pilots Association, International v. Quesada*, 276 F.2d 892, 894 (2nd Cir. 1960); *Southeastern Aviation, Inc. v. Hurd*, 209 Tenn. 639, 355 S.W.2d 436, 439 (1962). That

scheme, however, did not include the criminal prosecution of a person who operated an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Subchapter III of the Federal Aviation Program sets out the organization of the Federal Aviation Administration and the powers and duties of its Administrator. Section 1348(a) of subchapter III authorizes and directs the Administrator to develop plans for and formulate policy with respect to the use of navigable airspace and assign by rule, regulation or order the use of navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. Section 1348(c) authorizes and directs him to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and

[1123] airborne objects. Section 1354(a) of subchapter III empowers the Administrator to make rules and regulations as he deems necessary to carry out the program and to perform his powers and duties.

Subchapter VI of the Federal Aviation Program deals with safety regulation of civil aeronautics. Section 1421 of subchapter VI empowers the Administrator, and makes it his duty, to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time, among other things, such reasonable rules and regulations as he finds necessary to provide adequately for safety in air commerce.

A Federal Aviation Regulation, 14 Code of Federal Regulations (1976) § 91.9, prohibits the reckless operation of an aircraft:

> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.[9]

It is clear that FAR 91.9 was made under the authority of subchapter III and subchapter VI. *See* 14 CFR at page 105.

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9. There is also a Federal Aviation Regulation pertaining to alcoholic beverages and drugs and the operation of an aircraft. *See* 14 Code of Federal Regulations (1976) § 91.11.

Violation of FAR 91.9 is not a crime; no criminal sanctions are authorized. Section 1472(a) of 49 U.S.C.A. (1970), under the heading "Criminal Penalties," provides generally:

> Any person who knowingly and willfully violates any provision of this chapter (*except subchapters III*, V, *VI*, VII, and XII of this chapter), or any order, rule, or regulation issued by the Administrator or by the Board under any such provision or any term, condition, or limitation of any certificate or permit issued under subchapter IV of this chapter, for which no penalty is otherwise provided in this section or in section 1474 of this title, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject for the first offense to a fine of not more than $500, and for any subsequent offense to a fine of not more than $2,000. If such violation is a continuing one, each day of such violation shall constitute a separate offense. (emphasis added).

Subsections (b) through (p) provide penalties for specific acts, none of which includes careless or reckless operation of an aircraft. Subchapter IV and § 1474 of Title 49 do not concern FAR 91.9 *See* 14 CFR § 13.23. On

the other hand, § 1471 of Title 49 specifically provides that any person who violates the provisions of subchapters III and VI, or any rule, regulation, or order issued thereunder, shall be subject to a *civil penalty* of not more than $1,000 for each violation. *See* 14 CFR § 13.15. Also, the Administrator may, from time to time, reexamine any airman, and if, as a result of any such reexamination or as a result of any other investigation made by him, he determines that safety in air commerce or air transportation and the public interest requires, he may issue an order suspending or revoking an airman certificate. 49 U.S.C.A. (1970) § 1429. *See* 14 CFR § 13.19.

As we have indicated, the conduct proscribed by FAR 91.9 is a crime under Maryland law. Penalties authorized by Maryland Code (1957, 1968 Repl. Vol., 1974 Cum. Supp.) Art. 1A, § 10–1003(a) are a fine of not more than $500 or imprisonment of not more than 90 days or both. Section 10–1003(b) provides that "in addition to or in lieu of [those penalties] or as a condition to the suspension of a sentence which may be imposed . . . the court in its discretion may prohibit the violator from operating an aircraft within the State for such

period as it may determine but not to exceed one year." [10]

IV

[2] We have do difficulty whatever in deciding that Congress has not occupied the
[1124] entire field of aeronautics by the Federal Aviation Act of 1958. There is no such command explicitly stated in the language of the Act, and we do not find it implicitly contained in the statute's structure and purpose. Generally accepted, for example, is that in the economic area of aeronautics all state legislation is not excluded. *See Calkins, Federal-State Regulation of Aviation*, 50 Va.L.Rev. 1386, 1399–1402 (1964); *Comment*, 39 J.Air L. & Com. 521, 529–531 (1973); *Means & Chasnoff, State Regulation of Air Transportation: The Texas Aeronautics Commission*, 53 Tex.L.Rev. 653, 656–659 (1975). The Supreme Court has

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10. Maryland Code (1957, 1968 Repl. Vol., 1974 Cum.Supp.) Art. 1A, § 10–1002 provides: "Penalties for the violation of this section shall be as prescribed by § 10–1003(a) of this article." As we have indicated, § 10–1003(a) authorizes a fine and imprisonment. Neither § 10–1002 nor § 10–1003(a) refers to § 10–1003(b) and its additional sanctions.

held that the Federal Aviation Administrator in conjunction with the Environmental Protection Agency "has full control over aircraft noise, preempting state and local control." *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633, 93 S.Ct. 1854, 1859, 36 L.Ed.2d 547 (1973). But that conclusion was not because Congress had "unmistakably ordained" that its enactments alone were to regulate air commerce in its entirety, but because the 1968 amendment (82 Stat. 395) and the 1972 amendment (The Noise Control Act, 86 Stat. 1234) to the 1958 Act established "the pervasive nature of the scheme of federal regulation of aircraft noise." We construe the holding as limited to that aspect of aeronautics. *Id.*, 411 U.S. at 633, 93 S.Ct. 1854, at 1859.

Maryland has expressly retained its police powers with respect to crimes related to aeronautics. It declared in its Aviation Act, § 3–307 that "[a]ll crimes . . . committed by or against an airman or passenger while in flight over this State shall be governed by the laws of this State. . . ." Congress has recognized the right of a state to do so. In 1961 the Federal Aviation Act of 1958 was amended by designating criminal penalties for specific crimes. 49 U.S.C.A. (1970) § 1472(i)–(p).

See 14 CFR § 13.23. House Report 958 on the proposed legislation observed that "in the case of crimes committed in the airspace over States of the United States, most of the acts with which this legislation deals would be violations of the laws of one or more of such States." 1961 U.S.Code Cong. & Adm. News p. 2563. It declared: "The offenses punishable under this legislation would not replace any State jurisdiction but would, where both Federal and State law provided for punishment for the same act, be in addition to the State criminal Law." *Id.*, at 2564. In discussing the need for the legislation, the report stated, *id.*, at 2565:

> As is well known, the Federal Government does not provide a general criminal code for all crimes committed in the United States. That is the province of the various States. However, criminal codes of the States are at times supplemented by Federal Law in fields where the Federal Government has responsibilities.
>
> We wish to emphasize that it is not our intent to divest the States of any jurisdiction they now have. This legislation merely seeks to give the Federal Govern-

ment concurrent jurisdiction with the States in certain areas where it is felt that concurrent jurisdiction will contribute to the administration of justice and protect air commerce.

The Report asserted:

> This, we want to make clear, does not preempt any State jurisdiction but would only supplement it. *Id.*, at 2565.

We reject Ward's suggestion that "the entire [Maryland Aviation] Act should be struck down."

Having determined that Congress has not excluded all state action in the field of aeronautics or even in the more limited field of air safety, we center on § 10–1002 of the Maryland Aviation Act to ascertain whether it conflicts with the federal law in the field. Although the Maryland Statute
[1125] and the federal regulation prescribe identical conduct with respect to the careless or reckless operation of an aircraft,[11] the two

11. Section 10–1002, Art. 1A of the Maryland Act requires that "[i]n any proceeding charging careless or reckless operation of aircraft in violation of this section, the court determining whether the operation was careless or reckless shall consider the standards for safe operation of aircraft prescribed by federal statutes or regulations governing aeronautics."

laws are not coterminous because of the sanctions prescribed. When the relationship between the Maryland and federal laws as they are written, as they are interpreted and as they are applied, is considered, it is manifest that the Maryland law does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, namely, "to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft." 1958 U.S.Code Cong. & Admin. News, p. 3741. On the contrary, the Maryland law enhances the Congressional purposes and objectives by deterring through criminal sanctions the operation of an aircraft in such manner as to endanger the life and property of others. It would be incongruous indeed, in light of the federal purposes and objectives, if Maryland were to be constitutionally precluded from the criminal prosecution of a person for such conduct because a federal regulation authorized civil penalties.

We are not persuaded that there is a conflict of constitutional dimension simply

because the State court may prohibit a violator of its statute from operating an aircraft within Maryland for up to one year even though the violator holds a federal airman certificate which would permit him to operate an aircraft. Section 10–1003 of the State Statute expressly provides:

> In no event shall this subsection be construed as warrant for the court or any other agency or person to take away, impound, hold or mark any federal airman or aircraft certificate, permit, rating or license . . ..

In any event, we do not see how prohibiting, for a limited time, the operation of an aircraft within Maryland by a person who has been found guilty in a court of law of operating an aircraft in a careless or reckless manner so as to endanger the life or property of another could be said to stand as an obstacle to the Congressional purposes and objectives.

[3] In short, it was the clear intent of Congress that criminal prosecution of the proscribed conduct be left with the states, and there is no conflict within the contemplation of the doctrine of preemption between the State and federal laws.

[4, 5] Ward suggests that the declaration in § 10–1002 of the Maryland Aviation Act that the court in determining whether the operation of an aircraft was careless or reckless, shall consider the standards for safe operation of an aircraft prescribed by federal statutes or regulations governing aeronautics (see footnote 11 *supra*) "would seem to be an unconstitutional delegation of power" if the federal statutes and regulations must be followed. He refers only to a decision of the Court of Oyer and Terminer of New Jersey, *State v. Larson*, 10 N.J. Misc. 384, 160 A. 556 (1932), which invalidated a New Jersey statute. *Larson* is inapposite. There the question was whether the New Jersey Legislature was constitutionally permitted to authorize the conviction of a crime "when it has fixed no standard of conduct to be conformed to by the citizen but has left that standard to be fixed by the regulations of a subordinate administrative authority, either in its untrammeled discretion, or to conform substantially to the legislation of another sovereignty, such legislation being referred to in the act, but not incorporated therein." *Id.*, 160 A. at 557. Furthermore, there was a provision of the

[1126] New Jersey Constitution, Art. 4, § 7, par. 4, expressly forbidding the latter. Here the standard of conduct was fixed by the statute—an aircraft shall not be operated carelessly or recklessly so as to endanger the life or property of another—and the trial court was merely directed to look for guidance to federal standards with regard to such operation, ostensibly to promote uniformity. *Larson* observed, 160 A. at 558: "It may well be a sound exercise of legislative discretion to have the regulations for the conduct of a matter, so oblivious of artificial land boundaries as aviation, substantially identical for both intrastate and interstate commerce. Nor is there anything unconstitutional in the state's adopting as its own the federal policy." Ward does not claim, and it is clear, that the "careless or reckless" standard is not so vague and indefinite as to offend due process of law. *See Lashley v. State*, 10 Md. App. 136, 142, 268 A.2d 502, *cert. den.* 259 Md. 733, *appeal dism., cert. den.* 402 U.S. 991, 91 S.Ct. 2169, 29 L.Ed.2d 158 (1970). And *see Samson v. State*, 27 Md.App. 326, 335, 341 A.2d 817 (1975) giving at least tacit approval to a legislative provision regarding control of dangerous substances, Maryland Code (1957, 1971 Repl. Vol.) Art. 27, § 278(c), that any new substance which is

designated as controlled under federal law shall be similarly controlled under Maryland law absent objection by the Department of Health and Mental Hygiene.

We find that Maryland Code (1957, 1968 Repl. Vol., 1974 Cum.Supp.) Art. 1A, §§ 10–1002 and 10–1003 are not preempted by federal law. We hold, therefore, that the Circuit Court for Prince George's County did not err in denying the motion to dismiss the charges.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

ELDRIDGE, Judge, concurring in part and dissenting in part:

Section 10–1002 of Maryland Code (1957, 1976 Repl. Vol.), Art. 1A, makes it unlawful "for any person to operate an aircraft . . . while under the influence of intoxicating liquor . . . or to operate an aircraft . . . in a careless or reckless manner . . .." A violation of this section is generally punishable by fine or imprisonment under subsection (a) of § 10–1003. However, subsection (b) of § 10–1003 also provides for special sanctions for reckless operation of aircraft in addition to

those provided for in subsection (a). It states, in part:

> "(b) *Special.*—For any violation of § 10–1002 of this article, in addition to, or in lieu of, the penalties provided by subsection (a) of this section, or as a condition to the suspension of a sentence which may be imposed pursuant thereto, the court in its discretion may prohibit the violator from operating an aircraft within the State for such period as it may determine but not to exceed one year. Violation of the duly imposed prohibition of the court may be treated as a separate offense under this section or as a contempt of court. . . ."

I agree with the majority that, in light of the absence of federal criminal penalties for reckless operation of aircraft, the sanctions of fine and imprisonment provided in subsection (a) would not appear to be preempted by the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.* However, I cannot agree with the majority that there is no "conflict of constitutional dimension" between the federal act and subsection (b) of the State law which authorizes the court to prohibit an individual from operating an

aircraft within the state even though that person may hold a valid federal airman's certificate entitling him to operate an aircraft. This prohibition, which apparently would extend to both interstate as well as intrastate operations, is, in effect, a suspension of a federally issued airman's certificate. As the issuance and suspension and revocation of a pilot's license is a matter subject solely to federal regulation, I believe that § 10–1003(b) is invalid by virtue
[1127] of the Supremacy Clause, United States Constitution Art. VI, Cl. 2. *See Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 236, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947).

The Administrator of the Federal Aviation Administration (F.A.A.) is authorized to "issue airman certificates specifying the capacity in which the holders thereof are authorized to serve as airmen in connection with aircraft." 49 U.S.C. § 1422. An airman's certificate is required for operation of a civil aircraft in air commerce. 49 U.S.C. § 1430(a)(2). Air commerce is broadly defined as "interstate . . . air commerce . . . or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endan-

ger safety in, interstate, overseas, or foreign air commerce." 49 U.S.C. § 1301(4). The F.A.A. is empowered to reexamine any civil airman and, "[i]f, as a result of any such . . . reexamination, or if, as a result of any other investigation made by the Administrator, he determines that safety in air commerce . . . and the public interest requires, the Administrator may issue an order . . . suspending, or revoking . . . any . . . airman certificate . . .." 49 U.S.C. § 1429(a).

It has been held that Congress has sought to insure the safety of civil aviation by extending federal safety regulations to virtually all civil aviation, including wholly intrastate flights. *See Rosenhan v. United States*, 131 F.2d 932 (10th Cir. 1942), *cert. denied*, 318 U.S. 790, 63 S.Ct. 993, 87 L.Ed. 1156 (1943); *United States v. Drumm*, 55 F.Supp. 151 (D. Nev. 1944); *see also* Calkins, *Federal-State Regulation of Aviation*, 50 Va.L.Rev. 1386, 1395–1398 (1964). And in order to insure safety in civil aviation, Congress has delegated to the F.A.A. the responsibility of certifying pilots as competent to operate aircraft and has provided that the Administrator should revoke or suspend such certification when necessary in the interest of safety in air commerce.

Despite the fact that the F.A.A. has been delegated the authority by Congress to issue airman's certificates necessary to operate aircraft in civil aviation, the majority holds that a state may prohibit a holder of such a license to operate an aircraft. In my view, the conclusion is inescapable that a state statute which would prohibit that which is expressly permitted by a federal license, issued pursuant to federal law without qualification, is in direct and irreconcilable conflict with the federal law and therefore invalid under the supremacy clause. This was the conclusion reached by the Supreme Court in *Sperry v. State of Florida*, 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed.2d 428 (1963). There, the state of Florida sought to enjoin a non-lawyer, registered to practice before the United States Patent Office by the Commissioner of Patents, from counseling clients and preparing patent applications in Florida on the ground that such activities constituted the unauthorized practice of law in violation of state law. The Supreme Court noted that the states have "a substantial interest in regulating the practice of law within the State" and could, in the absence of federal legislation, prohibit nonlawyers from engaging in the type of

activities necessary for the preparation of patent applications. *Id.* at 383, 83 S.Ct. at 1325. However, Congress had by statute specifically authorized the Commissioner of Patents to prescribe regulations governing the representation of applicants before the Patent Office by "'*agents,* attorneys, *or other persons,*'" *id.* at 384, 83 S.Ct. 1322. Pursuant to regulations promulgated by the Commissioner, the petitioner was duly registered to represent applicants before the Patent Office. In holding that the state could not enjoin the petitioner from engaging in activities expressly authorized by federal law, the Supreme Court stated (373 U.S. at 385, 83 S.Ct. at 1326):

> "The statute thus expressly permits the Commissioner to authorize practice before the Patent Office by non-lawyers, and the Commissioner has explicitly granted such authority. If the authorization is unqualified, then, by virtue of the Supremacy Clause, Florida may not deny to those failing to meet its own qualifications the right to perform the functions within the scope of the federal authority. . . . 'No State law can hinder or obstruct the free use of a license granted

[1128]

> under an act of Congress.' *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518, 566, 14 L.Ed. 249."

Cf. Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 447, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960).

The fact that a state limitation on the exercise of the federally granted right is imposed only as a sanction incident to a conviction under an otherwise valid criminal statute does not alter this result under the Supremacy Clause. In *Castle v. Hayes Freight Lines*, 348 U.S. 61, 75 S.Ct. 191, 99 L.Ed. 68 (1954), an interstate motor carrier doing business under a certificate of convenience and necessity issued by the Interstate Commerce Commission pursuant to the Federal Motor Carrier Act, 49 U.S.C. § 301 *et seq.*, instituted an action to restrain Illinois officials from enforcing a statute providing for the suspension of the carrier's right to use state highways for a period of one year for repeated violations of state imposed weight limitations. The Illinois Supreme Court had held that the statute was invalid insofar as it applied to the carrier's interstate operations, conducted pursuant to its federal certificate, on the ground that it conflicted with the Federal Motor Carrier Act. The Supreme Court affirmed this decision.

The Supreme Court in *Castle*, in an opinion by Mr. Justice Black, reasoned that the Federal Motor Carrier Act was a "comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce" greatly reducing the power of the states to regulate interstate carriers. 348 U.S. at 63, 75 S.Ct. at 192. The Court pointed out that, although the states were free under the federal act to regulate the weight and distribution of loads carried in interstate trucks, nevertheless the federal government had the exclusive power to determine which carriers could operate in interstate commerce. Evidence of this exclusive power was found in the extensive conditions set forth in the act governing the issuance and revocation or suspension of certificates of necessity and convenience by the Interstate Commerce Commission. Noting that the suspension of a carrier's right to use state highways "is the equivalent of a partial suspension of its federally granted certificate," and given the comprehensive federal procedures governing the issuance of certificates of convenience and necessity, the Supreme Court said that "it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted

right to operate." *Id.* at 64, 75 S.Ct. at 193. In response to the contention that without the power to suspend a carrier's right to use state highways, the state could not effectively enforce otherwise valid regulatory statutes, the Supreme Court stated (*id.* at 64–65, 75 S.Ct. at 193):

> "It is urged that without power to impose punishment by suspension states will be without appropriate remedies to enforce their laws against recalcitrant motor carriers. We are not persuaded, however, that the conventional forms of punishment are inadequate to protect states from overweighted or improperly loaded motor trucks. Moreover, a Commission regulation requires motor carriers to abide by valid state highway regulations. And as previously pointed out, the Commission can revoke in whole or in part certificates of motor carriers which willfully refuse to comply with any lawful regulation of the Commission. If, therefore, motor carriers persistently and repeatedly violate the laws of a state, we know of no reason why the Commission may not protect the state's interest, either on the Commission's own initiative or on complaint of the state."

I believe that *Castle v. Hayes Freight Lines, supra*, is controlling. The regulation
[1129] of safety along highways has traditionally been viewed as an area of local concern, with the states being permitted great latitude in the absence of federal regulations. *See South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734 (1938). However, even in this area, the state cannot interfere with the exercise of a federal right. Aviation safety, on the other hand, is an area which, because of its nature, can only be adequately regulated through national control. As Mr. Justice Jackson said in *Northwest Airlines v. State of Minnesota*, 322 U.S. 292, 303, 64 S.Ct. 950, 956, 88 L.Ed. 1283 (1944) (concurring opinion):

"Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time.

"Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move

only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government."

If the states are precluded from effectively revoking or suspending a federal license through enforcement of criminal statutes in an area such as highway safety, where extensive state regulation has historically been permitted, then surely they may not do so in an area requiring almost exclusive federal control.

The Federal Aviation Act, like the statutory scheme considered in *Castle v. Hayes Freight Lines, supra*, provides for a comprehensive federal licensing procedure governing the issuance and the revocation or suspension of the federal license. As there,

because of its comprehensive nature, this regulation is exclusive. And as discussed above, this regulation extends to intrastate as well as interstate activities, unlike the regulatory scheme involved in *Castle v. Hayes Freight Lines, supra*. Given this exclusive and even more comprehensive federal regulation, I do not believe that the state, either directly, or indirectly, as an incident to enforcement of valid regulatory statutes as in *Castle v. Hayes Freight Lines, supra*, may hinder the exercise of a right granted pursuant to a federal statute. Although the state does have an interest in protecting its citizens from the reckless operation of aircraft, this interest can be protected through the more traditional sanctions of fines and imprisonment as provided for in § 10–1003(a). Moreover, as the record in this case demonstrates, the Federal Aviation Administration can revoke or suspend an airman's certificate if necessary to protect the public. The conduct prohibited by § 10–1002 is the same as that prohibited by the Federal Aviation Regulations. I cannot see why this is not sufficient to protect the state's interest without interference in the comprehensive and otherwise uniform federal regulatory scheme.

For these reasons, I would hold that subsection (b) of § 10–1003 of the Maryland act is invalid under the Supremacy Clause and that, therefore, the circuit court had no authority to prohibit the defendant from
[1130] operating an aircraft in this state for one year.[1]

SMITH, J., has authorized me to state that he joins in the views expressed herein.

---

1. An additional question would be presented in this case if we were reviewing the sentence originally imposed by the District Court rather than the sentence imposed by the circuit court. The circuit court did not place the defendant on probation but directly imposed the prohibition against flying pursuant to the purported authority set forth in subsection (b) of § 10–1003. As explained above, I believe that this statutory provision is unconstitutional. However, the District Court had made the prohibition against operation of an aircraft a condition of probation. While it is true that criminal courts generally have wide discretion in imposing reasonable conditions of probation, it is recognized that the imposition of certain conditions is beyond the power of the courts. *See Bird v. State*, 231 Md. 432, 190 A.2d 804 (1963); *United States v. Pastore*, 537 F.2d 675 (2d Cir. 1976) (Lumbard, J., concurring); Best and Birzon, *Conditions of Probation*, 51 Geo.L.J. 809 (1963); Note, *Judicial Review of Probation Conditions*, 67 Colum.L.Rev. 181 (1967). It is doubtful whether a state imposed prohibition

[footnote continued]

against operating an aircraft pursuant to a federal license, which could not be imposed directly as a sanction for violation of a criminal statute, could be imposed indirectly as a condition of probation. However, because we are reviewing the sentence of the circuit court following a *de novo* appeal instead of the sentence of the District Court, the question of whether or not a prohibition against operation of an aircraft could be imposed as a condition of probation is not presented.

Article 1A

ANNOTATED CODE OF MARYLAND
Section 10-1002

It shall be unlawful for any person to operate an aircraft in the air, or on the ground or water, while under the influence of intoxicating liquor, narcotics, or other habit-forming drug, or to operate an aircraft in the air or on the ground or water, in a careless or reckless manner so as to endanger the life or property of another. In any proceeding charging careless or reckless operation of aircraft in violation of this section, the court determining whether the operation was careless or reckless shall consider the standards for safe operation of aircraft prescribed by federal statutes or regulations governing aeronautics. Penalties for the violation of this section shall be as prescribed by § 10-1003 (a) of this article.

Section 10-1003

(a) General. - Any person violating any of the provisions of this article, unless otherwise specified, and any person violating any of the rules, regulations or orders issued pursuant to this article, shall be punishable by a fine of not more than $500.00 or by imprisonment of not more than 60 days, or both, in the discretion of the court.

(b) Special. - For any violation of § 10-1002 of this article, in addition to, or in lieu of, the penalties provided by subsection (a) of this section, or as a condition to the suspension of a sentence which may be imposed pursuant thereto, the court in its discretion may prohibit the violator from operating an aircraft within the State for such period as it may determine but not to exceed one year. Violation of the duly imposed prohibition of the court may be treated as a separate offense under this section or as a contempt of court. Upon a plea of guilty or conviction under § 10-1002 of this article in any case

involving a registrant under § 6-602 of this article, the court shall cause a notation of such plea or conviction and of the sentence imposed to be marked upon the pilot certificate or other evidence of pilot registration or receipt provided by the Administration under § 6-602. In no event shall this subsection be construed as warrant for the court or any other agency or person to take away, impojmd or hold any State registration certificate or other evidence of registration or payment of fees.

UNITED STATES CODE ANNOTATED
Title 49, Section 1508(A)
Declaration of National Sovereignty in airspace;
operation of foreign aircraft

(a) The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, includ- the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and loakes, over which by international law or treaty or convention the United States exercises national jurisdiction. Aircraft of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State.

Title 49, Section 1348 (a) (c)
Airspace control and facilities

(a) The administrator is authorized and directed to develop plans for the formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem neces-

sary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.

(c) The administrator is further authorized and directed to prescribe airtraffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, and land and/or water vehicles, and between aircraft and airborne objects.

Title 49, Section 1341 (a)
Federal Aviation Administration

(a) There is established the Federal Aviation Administration, referred to in this chapter as the "Administration." The Administration shall be headed by an Administrator who shall be appointed by the President, by and with the advice and consent of the Senate. The administrator shall be responsible for the exercise of all powers and the discharge of all duties of the Administrator, and shall have authority and control over all personnel and activities thereof. In the exercise of his duties and the discharge of his responsibilities under this chapter, the Administrator shall not submit his decisions for the approval of, nor be bound by the decisions or recommendations of, any committee, board, or other organization created by Executive order.

Title 49, Section 1304
Public Right of Transit

There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom

of transit through the navigable airspace of the United States.

Title 49, Section 1422 (a)
Airman Certificates

(a) The Administrator is empowered to issue airman certificates specifying the capacity in which the holders thereof are authorized to serve as airmen in connection with aircraft.

Supreme Court, U. S.
FILED
DEC 7 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-458

ROBERT DAVID WARD,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANCIS B. BURCH,
Attorney General
of Maryland,
CLARENCE W. SHARP,
Assistant Attorney General
Chief, Criminal Division,
ALEXANDER L. CUMMINGS,
Assistant Attorney General,
One South Calvert Street,
Baltimore, Maryland 21202,
383-3737,
Attorneys for Respondent.

The Daily Record Co., Baltimore, Md. 21202

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-458

ROBERT DAVID WARD,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY COMMENTS

This Brief in Opposition to Petition for Writ of Certiorari is filed pursuant to the request of this Honorable Court.

OPINIONS BELOW

On November 21, 1975, the Petitioner Robert David Ward was arrested pursuant to an arrest warrant and charged in the District Court of Maryland with operating an aircraft in a reckless and unsafe manner, under Article 1A, Sections 10-1002, 10-1003 of the Annotated Code of Maryland. On July 20, 1976, the Petitioner appeared for trial before the Honorable

William Bowie and the case was submitted to him on a stipulation of facts. On that same date the court found the Petitioner guilty of operating an aircraft in a reckless and unsafe manner and was sentenced to the jurisdiction of the County Detention Center for a period of ninety days and was required to pay a fine of five hundred dollars. However, the sentence of incarceration was suspended upon the special condition that he not operate an aircraft within the State of Maryland for a period of one year from September 17, 1976. Thereafter the Court of Appeals of Maryland granted the Writ of Certiorari filed by the Petitioner on October 4, 1976 requiring the parties to file briefs and present oral argument. On June 24, 1977 the Court of Appeals of Maryland filed a reported opinion in which it affirmed the judgment and sentence below as well as the order of the lower court denying the motion to dismiss the indictment. *Ward v. State,* 280 Md. 485, 374 A.2d 1118 (1977). From that decision of the Court of Appeals of Maryland the Petitioner has applied to this Honorable Court for a Writ of Certiorari to review the decision of the Court of Appeals of Maryland.

JURISDICTION OF THE COURT

Petitioner has invoked the jurisdiction of this Honorable Court pursuant to the provisions of Article 2, Section 2 of the Constitution of the United States. However, since these provisions are concerned with the powers of the President of the United States, the Respondent submits that Petitioner has failed to assert a proper basis upon which this Honorable Court could assume jurisdiction in this case. See Supreme Court Rule 23b (iii).[1]

[1] The jurisdiction of this Court may arguably be invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Whether the Federal Aviation Act of 1958 and the regulations promulgated thereunder which provide civil penalties for the reckless operation of an aircraft preempts the Maryland Aviation Statute which provides criminal penalties for such conduct.

STATUTES INVOLVED

Petitioner contends that Article 1, Section 8, Clause 3 and Article 6, Clause 2 of the Constitution of the United States and the Federal Aviation Act of 1958, Title 49, U.S. Code Annotated, Section 1301, *et. seq.*, and the Maryland Aviation Statute, Article 1A, Section 10-1002 and 10-1003 are involved.

STATEMENT OF THE CASE

The Respondent would incorporate by reference herein those facts as set forth under "Opinions Below" *supra.* In addition, Respondent adopts and incorporates by reference herein the facts as set forth by the Court of Appeals of Maryland in its Opinion (See pp. 6a-8a of the Appendix to the Petition in this case.)

ARGUMENT

I.

THE FEDERAL AVIATION ACT OF 1958 AND THE REGULATIONS PROMULGATED THEREUNDER WHICH PROVIDE CIVIL PENALTIES FOR THE RECKLESS OPERATION OF AN AIRCRAFT DO NOT PREEMPT THE MARYLAND AVIATION STATUTE WHICH PROVIDES CRIMINAL PENALTIES FOR SUCH CONDUCT.

A. The Issue Presented Was Given Full Consideration By The Court Of Appeals Of Maryland And Was Correctly Decided.

In the case at bar the facts established that the Petitioner operated his aircraft in a reckless and unsafe manner in the air space over the State of Maryland.

The Petitioner was charged and convicted under the Maryland statute which proscribes such conduct and provides criminal penalties therefor. Article 1A, Section 10-1002 and 10-1003 of the Maryland Code. Among the penalties imposed upon Petitioner was that he not operate an aircraft in or over Maryland for a period of one year. Concurrent to the proceedings in the State Court, the Federal Aviation Administration, pursuant to the regulations of the Federal Aviation Act, revoked the Petitioner's pilot license but subsequently reissued it to him.

The crux of the Petitioner's argument is that Maryland has no right to prosecute Petitioner criminally for reckless aircraft operation because civil penalties are provided for the same conduct under the Federal Aviation Act. The legal basis for this contention is that the Federal statute preempts the State law. It was upon these narrow grounds and the specific Federal and State statutory provisions that the Maryland court decided this case under the preemption doctrine. In an effort to have this Court accept review the Petitioner would have this Honorable Court believe that "If the present decision is left standing it will be open season for every State to share in the control of aircraft, destroying completely the uniformity of control which now exists and which is imperative due to the nature of flight." (Pet. 5). Respondent submits that such an assertion is completely unfounded and such an interpretation of the opinion below was neither expressed nor implied by the Maryland Court.

In any event it was within this context that the preemption doctrine was analyzed and applied in the instant case. The Respondent submits that the Court comprehensively and accurately delineated the principles of express and implied preemption under recent and not so recent decisions of the Court; *Jones v. Rath Packing Co.*, ___ U.S. ___, 97 S. Ct. 1305 (1977); *City of Philadelphia v. New Jersey*, ___ U.S. ___, 97 S. Ct. 987 (1977); *Knapp v. Schweitzer*, 357 U.S. 371, 78 S. Ct. 1302 (1958); *Kelly v. State of Washington*, 302 U.S. 1, 58 S. Ct. 87 (1937); *DeCanas v. Bica*, 424 U.S. 351, 96 S. Ct. 933 (1976) and others.

The Petitioner contends now, as he did below, that Congress expressly preempted the field of air commerce when it said "the United States of America is declared to possess and exercise complete sovereignty in the air space of the United States" 49 U.S.C. Annotated, Section 1508A. However, an identical contention was rejected by this Honorable Court in *Braniff Airways v. Nebraska State Board of Equalization and Assessments, et al.*, 347 U.S. 590, 74 S. Ct. 757 (1954)[2] which was concerned with the sovereignty clause of both the Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938 (which contained a sovereignty clause identical to that of Section 1508A.

Moreover, congressional legislative history lacks an expression of preemptive intent but contains a clear statement of a contrary intent. House Report 958 discussing the Federal Aviation Act makes it quite clear that the Act does not preempt state criminal jurisdiction over the air space. 1961 U.S. Congressional and Administrative News 2563-2566. (See Petition Appendix pp. 21a-22a).

In addition, there is no implied preemption of the Federal statute simply because of the comprehensive scheme of the Federal legislation. The subject of air navigation by its very nature requires intricate and complex responses from the Congress but without necessarily intending its enactment as the exclusive means of meeting the problem. Given the complexity of the matter addressed by Congress in the Federal Aviation Act of 1958, a detailed statutory scheme was

[2] The Court of Appeals did not cite or discuss *Braniff, supra.*

both likely and appropriate completely apart from any questions of preemptive intent. Therefore, Respondent submits that Congress did not impliedly intend to preempt the field of aviation by the mere enactment of this detailed statute. *Cf. Decanas v. Bica, supra* and *New York State Department of Social Services v. Dublino,* 413 U.S. 405, 93 S. Ct. 2507 (1973).

Having thus established the general power of the State to regulate air commerce, the remaining issue is whether the State statute conflicts with the Federal Act. It is undisputed that the conduct proscribed under both statutes (reckless operation of an aircraft) is identical. Petitioner claims however, that because the penalty provision of the Maryland Statute ordered him not to fly an airplane in Maryland for a year at a time when he maintained a federal pilot's license in good standing, the two statutes conflict. In response the Respondent would initially emphasize that there is no inherent conflict in the sanctions imposed under the Federal Regulations and the State statute. It was only by dint of the fact that the FAA, following revocation, reinstated the Petitioner's Federal Pilot's license that he was able to argue this conflict. Had his license not been reinstated his conflict argument in the Court below and now on appeal would have fallen of its own weight. Additionally, the Court of Appeals recognized: (Petition Appendix pp. 23a-24a)

> "it would be incongruous indeed, in light of the Federal purposes and objectives, if Maryland were to be constitutionally precluded from the criminal prosecution of a person for such conduct because a federal regulation authorized civil penalties.
>
> * * * * * *
>
> In any event, we do not see how prohibiting, for a limited time, the operation of an aircraft within Maryland by a person who has been found guilty in a court of law of operating an aircraft in a careless or reckless manner so as to endanger the life or property of another could be said to stand as an obstacle to the Congressional purposes and objectives."

Finally, this Honorable Court has recognized "that the same act might, as to its character and tendencies and the consequences it involved, constitute an offence against both the state and Federal Government and might draw to its commission the penalties by either as appropriate to its character in reference to each." *California v. Zook,* 69 S. Ct. 841 (1949); *Stathes v. State,* 29 Md. App. 474 (1975), *cert. den.* ____ Md. ____ (Petition Docket 2, September Term, 1976), May 5, 1976, appeal dismissed for want of a substantial Federal question 97 S. Ct. 36 (1976).

B. The Question Lacks Sufficient Importance To Warrant Review By This Court.

In the Court below the parties were unable to discover precedents controlling on the facts and issues presented in this case. The Court of Appeals made specific mention of this fact when it said:

> "We have not been referred to a decision of another jurisdiction state or federal, which addresses the matter of preemption of a statute prohibiting such operation of an aircraft. There being no decision precisely on point to bind or persuade us, we shall follow the path laid down by the decisions of the Supreme Court of the United States concerning the doctrine of preemption to determine whether the Maryland statute is enforceable."

In addition, while there are many states that have enacted reckless operation of aircraft statutes, the Petitioner has not cited any statute containing penalty provisions identical or similar to the Maryland statute which, according to him, created in Maryland the conflict between its statute and the Federal Aviation Act. In view of these facts, the urgency, immediacy and

importance of the issue evaporates under closer scrutiny. The Respondent further submits that this Court should not exercise its discretion to review this case since the decision of the Maryland Court is based upon the operation of a Maryland Statute within the confines of the State of Maryland. See *DelVecchio v. Bowers*, 296 U.S. 280 (1935).

The Respondent also notes that while Petitioner does not allege that there are *conflicting decisions* decided by the lower Federal or State courts, he does cite four cases in support of his position. However, those cases are simply inapposite to the facts and issues presented in this case. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S. Ct. 1854 (1973) found only that the Noise Control Act Amendment to Federal Aviation Act preempted local control and regulation of airplane noise. The present case is not concerned with noise control but rather reckless flying.

In *American Airlines, Inc. v. Town of Hempstead*, 398 F.2d 369 (2nd Cir. 1968), cited by the Appellant, the Court again considered a noise ordinance in light of the Federal Aviation Statute of 1958. American Airlines argued that (1) the ordinance was an undue burden on interstate commerce, (2) was preempted by the Federal Statute and (3) the ordinance was in direct conflict with the Federal regulation. The Court declined to consider the preemption and burden contentions but rather based its decision on a finding of a conflict between the ordinance and federal regulations which it held to be in direct conflict with one another not because the regulations and ordinance imposed different standards for noise, but because the present state of development of noise suppression techniques would mean that compliance with the noise ordinance would require alterations in the flight patterns and procedures established by Federal regulations. This was also the case in *Burbank, supra.* However, in the present case

the situation is again entirely different in that there is no evidence of facial impossibility of compliance with both the State and Federal requirements.

Likewise, *Allegany Airlines v. Village of Cedarhurst*, 238 F.2d 812 (2nd Cir. 1956) cited by Appellant held invalid an ordinance prohibiting flights over the village at altitudes below 1,000 feet. Despite the broad preemption language contained therein the Court was there dealing with an ordinance which "plainly conflicts with the Federal statutes and regulations." (id. at p. 814). Moreover, the action and the words of the trial court did "not affect the rights of property owners"; their claims based on nuisance and trespass had been withdrawn.

Finally, *City of Newark, New Jersey v. Eastern Airlines*, 159 F. Supp. 750 (D.C. N.J. 1958), cited by Appellant did not hold that the operation of state law, in that case the law of New Jersey, was precluded. The first count of that action under a nuisance theory sought an injunction against operations over certain areas at altitudes below 1200 feet. The District Court viewed this as an amendment to the Civil Air Regulations and denied relief applying the doctrine of primary jurisdiction. The second count sought an injunction and damages on a trespass theory. The court stated (p. 760) that "the principals do not foreclose the right of landowners to maintain an action for trespass to realty in a proper case." However, relief was denied because plaintiffs had failed to present sufficient evidence to support their claims. It is to be noted that it had been stipulated that all operations were in accord with Federal law.

C. The Decision Of The Court Of Appeals Of Maryland Was Fundamentally Fair And In Accord With Sound Reasons Of Public Policy.

The primary purpose of state control over air traffic is to secure the public safety and general health of the

people in which the state acts in conjunction with the Federal government pursuant to the state aviation statutes in furtherance of these goals. The state law is in essence nothing more nor less than an enforcement measure in aid of Federal legislation to regulate aircraft within the boundaries of the state. It cannot be said that a state is precluded from enacting legislation which has the effect of enforcing Federal regulations which apply peculiarly within state limits. The primary purpose of any legislation to control aircraft is to ensure the public safety and general health of all the people. The state law is directed to the same objective. Enforcement machinery of the Federal government is often inadequate to police every airport in every State of the union. Therefore, proper enforcement by state authorities is necessary. Cf. *People v. Newhauser,* 92 N.Y.2d 291 (1949); *People v. Altman,* 304 N.Y.2d 534 (1969).

The Petitioner fails to take into account these public policy considerations and urges that the Federal government should be the only agency to enforce Federal laws regulating the operation of aircraft. However, such a position could lead to absurd results as illustrated by a recent aircraft accident which occurred at Memorial Stadium, Baltimore, Maryland within the last year where a small airplane crashed into the upper stands of the stadium. Fortunately, tragedy was averted and no serious injuries occurred because spectators at a football game that afternoon had moments before vacated the stadium. To suggest that only civil penalties could be imposed under Federal regulations for that conduct thus precluding criminal penalties under State law is indeed ludicrous.

While the question was dealt with in a different context, this Court has long held that every citizen in the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns and

may be liable to punishment for infractions of the laws of either. The same act may be an offense or transgression against the laws of both and either or both may punish such offender. *Bartkus v. Illinois,* 359 U.S. 676 (1959). Analogously, although there exists a Federal criminal bank robbery statute, that fact does not mean that a State cannot prosecute an individual for bank robberies under its own laws. Likewise, Respondent submits that, simply because there is a Federal law proscribing the reckless operation of an aircraft, that fact does not mean that the State cannot prohibit and punish the same conduct under its law.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari to the Court of Appeals of Maryland should be denied.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General
of Maryland,
CLARENCE W. SHARP,
Assistant Attorney General
Chief, Criminal Division,
ALEXANDER L. CUMMINGS,
Assistant Attorney General,
One South Calvert Street,
Baltimore, Maryland 21202,
383-3737,
Attorneys for Respondent.